83-1478

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JERSEY CENTRAL POWER & LIGHT COMPANY,
Appellant,

v.

BOARD OF PUBLIC UTILITIES OF THE STATE OF NEW JERSEY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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March 5, 1984

Questions Presented

1. Was the Court below correct in holding that the three investor-interest components of the criteria for determining whether electric utility rates are "just and reasonable" as specified by this Court in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 603 (1944) "are not of constitutional dimension", even though rates which would satisfy such investor-interest criteria would not exploit customers?

2. Are ratemaking determinations which fail to assess their consequences to customers and investors violative of the due process requirements of the Fifth and Fourteenth amendments by reason of being arbitrary and capricious and preclusive of meaningful judicial review?

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* In addition to the Appellant and Appellee, the parties below were Joseph H. Rodriguez, Public Advocate of New Jersey, the County of Ocean, New Jersey, the American Society of Utility Investors and Diane Fahey.

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JURISDICTIONAL STATEMENT

Jersey Central Power & Light Company ("Jersey Central"), the Appellant, appeals from the final judgment of the Supreme Court of the State of New Jersey, denying Appellant's request for review of the decision of the New Jersey Superior Court, Appellate Division ("Appellate Division"). The Appellate Division held that the investor-interest components of the criteria for determining whether electric utility rates fixed by a rate regulatory agency are "just and reasonable" as specified by this Court in *Federal Power Commission* v. *Hope Natural Gas Company*, ("Hope"), 320 U.S. 591, 603 (1944) "are not of constitutional dimension", even though rates which would satisfy those criteria

would not exploit customers. On this basis, the Appellate Division held that orders of the Board of Public Utilities of the State of New Jersey ("Board"), the Appellee, fixing Jersey Central's rates for electric service which do not meet those investor-interest criteria are not violative of the Fifth and Fourteenth Amendments of the Constitution of the United States. The Appellate Division also held that the Board had not denied Jersey Central due process by failing to assess the consequences of its orders to customers and investors. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial Federal constitutional question is presented.

Opinions Below

The orders of the Supreme Court of the State of New Jersey are not reported and are annexed as Appendices A-1 and A-2. The opinion of the Appellate Division (dealing with several consolidated appeals and cross appeals from orders of the Board) is not reported and is annexed as Appendix B-1. Appellant's Notice of Appeal to the Supreme Court of New Jersey and Notice of Petition for Certification to that Court is annexed to Appendix B-2. The orders of the Board, dated May 13, 1980, July 31, 1981 and July 22, 1982 are not reported and are annexed as Appendices C-1, C-2 and C-3.

Jurisdiction

On April 29, 1980, Jersey Central filed a petition for an increase in its base rates of $173.5 million annually. By an order dated May 13, 1980 (Appendix C-1), the Board granted an emergency increase of $60 million annually in response to that petition and by an order dated July 31, 1981 (Appendix C-2), the Board granted a final increase of $110.7 million annually (including the $60 million emergency increase). Jersey Central appealed the Board's July 31 1981 order to the Appellate Division.

While that appeal was pending in the Appellate Division, Jersey Central filed on August 11, 1981 a petition for a rate

increase of $238.5 million annually (later reduced to $215.4 million annually). By an order dated July 22, 1982 (Appendix C-3) the Board granted an increase of $82.7 million annually. Jersey Central also appealed that the order of the Board to the Appellate Division.

Both appeals of Jersey Central, as well as the appeals and cross-appeals filed by the New Jersey Public Advocate Division of Rate Counsel ("Rate Counsel")[1], were denied by the Appellate Division.

In each of the proceedings before the Board which resulted in the Board's orders annexed as Appendices C-1, C-2 and C-3, Jersey Central argued that, while the Board has complete discretion to select whatever ratemaking methodology or formula it chooses, the end result of its ratemaking orders must (in order to comply with the requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States) balance the interests of consumers and investors in the manner delineated by this Court in *Hope*, (1) "to protect consumers against exploitation" and (2) "to promote the 'financial integrity' of the natural gas companies as measured, not only by revenues sufficient to recover operating expenses and capital costs . . . but also by revenues 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital'."[2]

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1. The appeals and cross-appeals of Rate Counsel to the Appellate Division were based on Rate Counsel's contention that, in fixing rates, the Board was required to determine whether Jersey Central, as the owner of an undivided 25% interest in the Three Mile Island nuclear generating station ("TMI") was "at fault" in connection with the TMI-2 accident on March 28, 1979. This contention was initially rejected by the Board in an order dated April 23, 1981, which is not reported and is annexed as Appendix D. It was also rejected by the Board in other orders not included in the Appendix. The appeals and cross-appeals of Rate Counsel to the Appellate Division were denied by that Court as part of its decision, annexed as Appendix B. Rate Counsel sought review of that aspect of the Appellate Division's decision by the Supreme Court of New Jersey, which was denied by that Court.

Jersey Central believes that the appeals and cross-appeals of Rate Counsel do not raise a substantial Federal Constitutional question.

2. This summary of the holding in *Hope* appears in the opinion of Justice Douglas, speaking for a unanimous Court in *FPC* v. *Memphis*

In each of the proceedings before the Board, Jersey Central presented evidence to demonstrate that the rate increases it was seeking would not exploit consumers. It also presented evidence to demonstrate that each of the rate increases it was seeking was the minimum required to meet the investor criteria delineated in *Hope*. Notwithstanding the fact that this issue was squarely presented to the Board in testimony, briefs and oral argument, in its final rate orders, dated July 31, 1981 (Appendix C-2) and July 22, 1982 (Appendix C-3), the Board did not even address this issue. The Board did not find—and indeed, on the record before it, it could not have found—that the rate increases sought by Jersey Central would exploit customers. Similarly, the Board did not find—and indeed, on the record before it, it could not have found—that the rates which it authorized would assure Jersey Central's financial integrity so as to maintain its credit and to attract capital. Instead, the Board chose to ignore the subject completely in the ratemaking orders which are the subject of this jurisdictional statement.[3]

In its appeals to the Appellate Division, this was the central issue raised by Jersey Central. As previously noted, the Appellate Division held that the investor-interest components of the criteria of *Hope* "are not of constitutional dimension." The Supreme Court of New Jersey denied Jersey Central's petition, again based on that central issue, that that Court review the decision of the Appellate Division.

Light, Gas & Water Division, 411 U.S. 458, 465-466 (1973). Justice Douglas was the author of the majority opinion in *Hope*.

3. The failure of the Board to address this issue in these ratemaking orders is particularly startling in light of the fact that, in its order, dated April 23, 1981 (Appendix D) which did not directly involve the establishment of rates, the Board stated in rejecting the "fault" contention of Rate Counsel:

> ". . . there has been engrafted into the statutory framework requiring the Board to fix just and reasonable rates, N.J.S.A. 48:2-21, the 'Hope Standards' which require this Board to fix a level of rates that will provide for the financial integrity of the utility, provide it with the ability to finance needed construction, the opportunity to earn a reasonable rate of return and, most important, the ability to continue to render safe, adequate and proper service . . ."

Jersey Central had repeatedly urged that the Board, in its rate orders, make unambiguous findings of fact concerning its assessment of the impact of its orders on Jersey Central's customers and investors. The Board ignored these requests. In its appeal to the Appellate Division and unsuccessful efforts to obtain review by the New Jersey Supreme Court, Jersey Central pointed out that the consequence of the Board's failure to make such findings was to make the Board's orders appear arbitrary and capricious and to preclude meaningful judicial review and thus to deny Jersey Central due process, noting the appositeness of this Court's statement in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) at 792:

> "Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry."

See also *D.C. Transit System* v. *Washington Metro Area Trans. Com'n*, 350 F.2d 753 (D.C. Cir. *en banc* 1965), cert, denied 393 U.S. 1081 (1969).

In rejecting Jersey Central's argument on this score, the Appellate division merely stated that *Hope*

> "... does not say that specific findings must be made on the impact of the order on the company's financial integrity."

It is surprising, to say the least, that the Appellate Division should have referred at length to *Permian* as a basis for reaching its erroneous (in our view) conclusion that the investor-interest components of the *Hope* criteria are not of constitutional dimension, but should have ignored *Permian* completely in considering the need for explicit findings as a predicate for meaningful judicial review.

The order of the New Jersey Supreme Court was entered on December 6, 1983. Appellant's Notice of Appeal to this Court was filed with the New Jersey Supreme Court on March 5, 1984. Because the action of the Board is the equivalent of a statute of

New Jersey for jurisdictional purposes, jurisdiction to review the order of the New Jersey Supreme Court is conferred upon this Court by 28 U.S.C. § 1257(2). *Williams* v. *Bruffy*, 96 U.S. 176 (1878); *Lake Erie & Western R.R. Co.* v. *Public Utilities Commission*, 249 U.S. 422 (1919); *Bluefield Co.* v. *Pub. Serv. Commission*, 262 U.S. 679 (1923); *Live Oak Water Users' Ass'n* v. *Railroad Commission*, 269 U.S. 354 (1925); *Atchison, Topeka and Santa Fe R. Co.* v. *Public Utilities Commission*, 346 U.S. 346 (1953); *Lathrop* v. Donohue, 367 U.S. 820 (1961).

Constitutional and Statutory Provisions Involved

Fifth Amendment, United States Constitution:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> ". . . nor shall any state deprive any person of . . . property, without due process of law . . . ."

New Jersey Statutes Annotated, 48:2-21(d):

> "When any public utility shall increase any existing . . . rates . . . , the board . . . shall have the power . . . to determine whether the increase . . . is just and reaonable . . . The board shall approve the increase . . . upon being satisfied that the same is just and reasonable."

Statement of the Case

Jersey Central provides electric service to the approximately two million residents of its 3,300 square mile service area comprising approximately half the land area in New Jersey. For a decade prior to the March 28, 1979 accident at Unit No. 2 of the Three Mile Island nuclear generating station ("TMI-2") in which Jersey Central owns a 25% undivided interest, its rates were the lowest in the State and were also appreciably below those in neighboring areas in New York. This was in significant

part attributable to Jersey Central's ownership of the Oyster Creek nuclear generating station (placed in service in 1969) and of an undivided 25% interest in the TMI-1 nuclear generating unit (placed in service in 1974).

Jersey Central is a subsidiary of General Public Utilities Corporation ("GPU"), a public utility holding company registered under the Public Utility Holding Company Act of 1935. GPU's other public utility subsidiaries, Metropolitan Edison Company and Pennsylvania Electric Company, provide electric service to the approximately 2.4 million residents of their 17,600 square mile service areas (comprising about half the land area in Pennsylvania) and respectively own 50% and 25% undivided interests in TMI.

TMI-2 was placed in commercial service in December, 1978. The TMI-2 accident occurred three months later on March 28, 1979, and made TMI-2 inoperable. Although the TMI-2 accident did not result in damage to TMI-1, the Nuclear Regulatory Commission ("NRC") has required that TMI-1 not be operated until authorized by the NRC.

New Jersey procedures for fixing rates for electric utilities provide for the establishment of base rates in conventional rate proceedings, and for the establishment of levelized energy adjustment clause ("LEAC") charges (intended to recover only energy costs) in abbreviated proceedings, including hearings, subject to later revision in conventional rate proceedings.

At the time of the TMI-2 accident, Jersey Central's LEAC charges in effect had been predicated on the anticipated availability of generation from TMI-1 and TMI-2. In order to continue service to its customers, Jersey Central had to purchase replacement power from neighboring utilities at higher cost. In May 1979, Jersey Central applied to the Board for an increase in its LEAC charges, which was authorized by the Board on June 18, 1979. In its order granting the increased LEAC charges, the Board also reduced Jersey Central's base rates by an amount representing Jersey Central's share of the operating and capital costs of TMI-2. Given its need for a final LEAC order as a basis

for bank borrowings in order to continue the purchases of replacement power, Jersey Central was not in a position to, and did not, appeal the Board's June 18, 1979 order.

Fuel and energy costs continued to rise and Jersey Central had to seek further increases in its LEAC charges. Jersey Central did not seek at that time an increase in its base rates. An increase in the LEAC charges was granted by the Board by an order dated April 1, 1980. In another Order, also dated April 1, 1980, the Board eliminated from Jersey Central's base rates the capital and operating costs of TMI-1, as well as those of TMI-2. Jersey Central argued to the Board that, while the Board had broad discretion as to ratemaking methodology and formulae, *Hope* and its progeny required that the Board apply the criteria therein set forth to determine whether the rates prescribed by the Board appropriately balanced the interests of consumers and investors. In that context, Jersey Central pointed out that its total charges to its customers were below those of the great majority of the customers of other New Jersey electric utilities and of utilities in neighboring areas in other states, and that the base rates fixed by the Board were below those necessary to meet the *Hope* criteria for investor interests. The Board refused to address this issue and Jersey Central appealed to the Appellate Division.

The New Jersey Supreme Court certified this appeal to itself before decision by the Appellate Division. In the meantime, Jersey Central had filed a petition for a base rate increase. On April 8, 1981, the New Jersey Supreme Court affirmed the Board's April 1, 1980, order, *In re Jersey Central Power & Light Company Petition*, 85 N.J. 520, 428 Atl. 2d 498 (1981). In that opinion, the New Jersey Supreme Court indicated that it did so, in part at least, based on the unusual procedural posture in which Jersey Central ". . . had not applied for a rate increase so that available avenues of relief were limited." 85 N.J. at 531; 428 Atl. 2d at 503-4.

That court also recognized that Jersey Central then had pending before the BPU a rate increase application, and stated:

> "We regard the numerous issues raised by the utility in this appeal to be more properly presented in the pending rate increase proceeding,[4] In addition to dealing with the utility's troubled financial condition and fixing just and reasonable rates, the Board in that proceeding necessarily will have to give full attention to the continued exclusion of TMI-1 from the rate base."[5] 85 N.J. at at 532; 428 Atl. 2d at 504.

Notwithstanding this seeming directive from the New Jersey Supreme Court on April 8, 1981 and the Board's own recognition of the requirements of *Hope* in its April 23, 1981 order which did not fix rates, less than four months later the Board's July 31, 1981 ratemaking order wholly ignored *Hope*. The Board's July 22, 1982 ratemaking order did the same thing.

In the proceedings before the Board and in the appeals to the Appellate Division and petition to the New Jersey Supreme Court for review of the Appellate Division's decision, Jersey Central presented unchallenged evidence that, even if its requested rate increases were granted in full, Jersey Central's rates would be in line with those of customers of other utilities in New Jersey and neighboring areas. (See, e.g. Appendix, pages A-49 through A-52) Neither the orders of the Board nor the decision of the Appellate Division suggested that the rates sought by Jersey Central would "exploit" its customers. It was also undisputed that Jersey Central has continued to render safe, adequate and reliable service.

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4. The "pending rate increases proceeding" referred to by the New Jersey Supreme Court is the proceeding that gave rise to the July 31, 1981 order of the Board (Appendix C-2) that was the subject of the first of the consolidated appeals and cross-appeals to the Appellate Division now sought to be reviewed by this Court.

5. Although this passage suggests otherwise, Jersey Central had not contested before the Board or the New Jersey Supreme Court the power of the Board to exclude TMI-1 from the rate base. Rather it had urged there, as it does here, that, regardless of the methodology chosen by the Board, the end result of the Board's orders must satisfy both the customer and investor interest criteria delineated in *Hope*.

In those proceedings before the Board and before the New Jersey courts, Jersey Central also established, without challenge, that the revenues allowed to it by the Board's orders were not sufficient to promote its financial integrity and to enable it to attract capital. For four years, Jersey Central was unable to pay a single dollar of dividends on the common stock investment in Jersey Central of approximately $700 million. Jersey Central has been unable to sell any long-term securities since 1979. It does not have the financial means to undertake any major generating facility construction programs or even to implement fully its load management and conservation program.

As previously noted, the Board's orders do not even address the investor component of the *Hope* criteria. The Appellate Division does address that component, but it reaches the startling—and unfounded, we believe—conclusion that those criteria are not of Constitutional dimension. In so doing, the Appellate Division mistakenly reads *Permian* as overruling *Hope* and, yet, ignores *Permian's* exposition (at 792) of the need for clear findings by a regulatory agency in order that there can be meaningful judicial review.[6]

The Federal Question is Substantial

Almost forty years ago, in *Hope*, this Court relieved rate regulatory and reviewing courts of the shackles of conformity to particular ratemaking methodology and formulae.[7] In so doing, however, this Court also provided the twin consumer-interest and investor-interest criteria by which to ascertain whether the end result of a ratemaking order meets the "just and reasonable" rate standard. More than fifteen years ago, in *Permian* this Court

6. The Appellate Division's opinion attributes to Jersey Central positions that it did not take and arguments that it did not make. Jersey Central's position before the Board and Appellate Division, and its arguments made to them, are consistent with those made in this Jurisdictional Statement.

7. This aspect of the decision in *Hope* had been foreshadowed, two years earlier, by this Court's decision in *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 585-6 (1942), which recognized—as did this Court again in *Permian*—that the "just and reasonable" standard of the Federal Power Act "coincides with that of the Constitution" and also that "the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense."

held that the "just and reasonable" standard as construed in *Hope* "coincides" with the applicable constitutional standards. More than a decade ago, in *FPC* v. *Memphis Light, Gas and Water Division*, 411 U.S. 458 (1973) this Court not only unanimously reaffirmed the continuing vitality of the *Hope* criteria, but it reversed the Court of Appeals for the District of Columbia Circuit because that court had ignored the investor interest component of the *Hope* criteria.[8]

The decision of the Appellate Division challenges directly those holdings of this Court. It eliminates any concrete standards by which the results of ratemaking may be evaluated. Under that decision, so long as a ratemaking agency merely asserts that it is "balancing investor and consumer interests", there is no function for a reviewing court to perform and no judicial remedy available to assure compliance with the holdings of this Court.

The Court's Historic Role and the National Interest Warrant Review by This Court

During the 44 year period between *Smyth* v. *Ames*, 169 U.S. 466 (1898) and *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), the Court heard an unduly large number of utility rate cases, as it sought to clarify the so-called "rule of *Smyth* v. *Ames*". Justices Brandeis and Holmes were highly critical of these efforts. See, *e.g. Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U.S. 276, 289 (1923) (cited approvingly in *Hope, supra*, at 603). Yet, they also recognized that investors in public utility securities are constitutionally entitled to a return of, and on, the capital they supplied to the utility so long as the resulting rates are not prohibitive, exhorbitant or unduly burdensome to the public. *Southwestern Bell, supra*, at 290.

Jersey Central recognizes fully the limits on the Court's review of State statutes reflected in *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-732 (1963). But in *Ferguson*, the Court also recognized

8. Although the decision in *Memphis* and its significance were presented to the Appellate Division, its opinion does not mention *Memphis*.

that State statutes can run afoul of a specific Federal constitutional requirement and, thereby, be invalid. The Fifth and Fourteenth Amendments are just such a specific Federal constitutional limitation on State action.[9]

Jersey Central respectfully submits that the Appellate Division's opinion in this case demonstrates that State ratemaking actions have, in recent years, become unhealthily insulated from review by the Court. It is one thing for the Court, quoting Justice Douglas (who was the author of the Court's opinions in both *Hope* and *Memphis*) to refuse to sit as a superlegislature to weigh the wisdom of State legislation. *Ferguson, supra*, at 731. It is another for the Court to refuse to consider, year after year, the application of Federal Constitutional criteria to ratemaking actions by State agencies and courts.

In *Hope, supra* and *Memphis, supra* the Court set forth the criteria to be employed in determining whether rates meet the just and reasonable standards of the Natural Gas Act and, in *Natural Gas Pipeline, supra* and *Permian, supra* held "the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards". We submit that it is abundantly clear that the Appellate Division has misapplied the teachings of this Court and, in the process, made ephemeral the Constitutional rights of investors carefully preserved by this Court.

The New Jersey courts are charged not only with the construction of New Jersey law. They are also charged with the application of the Federal Constitution (and the decisions of this Court relating to the Constitution) to such laws. In this case, the Appellate Division erred in its application and the New Jersey

9. As previously noted, in *Permian, supra* at 769-770, the Court recognized once again that the Fifth and Fourteenth Amendments place some limits on the governmental exercise of ratemaking authority, citing *Stone* v. *Farmers Loan & Trust Co.*, 116 U.S. 307, 331, (1886) and *Covington & Lexington Turnpipe Co.* v. *Sandford*, 164 U.S. 578, 593 (1896) (both of which involved *State* ratemaking actions) and that a balancing of consumer and investor-interests in accordance with the *Hope* criteria is necessary to pass Constitutional muster.

Supreme Court refused to consider whether it should correct that error.

Review by this Court is warranted to assure that the New Jersey courts and other State courts fully discharge their federal responsibilities.

Conclusion

The services rendered by electric, gas, telephone, water and other utilities are essential to the health and well-being of the Nation. In terms of requirements for capital, they far overshadow any other industry. Regulation of their rates and service is singularly pervasive and a demonstration of the awesome power of government. Because that power is primarily wielded at the State, rather than Federal level there is little constraint on its exercise other than that arising from the Fifth and Fourteenth Amendments to the United States Constitution as interpreted by this Court.

By and large, the regulators of public utility rates are well-intentioned, hardworking, and intelligent custodians of the public weal. This is clearly true of the members of the New Jersey Board. But their task is most difficult and the public pressures upon them are intense. Their ability to discharge their responsibilities properly will be enhanced, not diminished, by a reminder by this Court to such regulators and state appellate courts at this time of its observation in *Permian, supra* at 769 that:

> "It is, however, plain that the 'power to regulate is not the power to destroy', *Stone* v. *Farmers' Loan & Trust Company*, 116 U.S. 307,331; *Covington & Lexington Turnpike Co.* v. *Sandford, supra*; and that maximum rates must be calculated for a regulated class in conformity with pertinent constitutional limitations.

For the foregoing reasons, the Appellant respectfully submits that the Federal questions presented by this appeal are substantial and of public importance and were properly presented below and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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March 5, 1984

Certificate of Service

I hereby certify that on the 5th day of March, 1984, copies of the foregoing Jurisdictional Statement and of the Separate Appendix thereto were mailed, by first class mail, postage prepaid, to the Board of Public Utilities, State of New Jersey, 1100 Raymond Boulevard, Newark, New Jersey 07102, Attention: Ms. Blossom Peretz, Secretary. I further certify that all parties required to be served have been served.

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